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No. 59-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FRANK TURNER, LAURA SPEER, DALLAS BURTON, WILLIAM LEE,

Petitioners,

—v—

THE CLEVELAND MUNICIPAL COURT; THE HONORABLE SAMUEL CALANDRA, THE HONORABLE RICHARD M. BERMAN, THE HONORABLE FRANK O'NEILL, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 81-2266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK TUROSO, LAURA SPIKER, DALENE BURGUN, WILLIAM LEE,

Petitioners,

—v—

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, THE HONORABLE RICHARD M. BRENNAN, THE HONORABLE FRANK O'BELL, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether Ohio's obscenity statute, as written and construed by the Ohio Supreme Court and upheld by the Court of Appeals below, is unconstitutionally overbroad or vague under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

On February 4, 1982, the United States Court of Appeals for the Sixth Circuit handed down two companion opinions upholding the Ohio obscenity laws.

In Sovereign News Co. v. Falke, et al., 674 F.2d 484 (6th Cir. 1982), the Court of Appeals upheld the Ohio statutes and vacated and remanded the District Court judgment which had reaffirmed its 1977 Declaratory Judgment that Ohio's laws were unconstitutional and also continued the 1977 Preliminary Injunction against enforcement of those statutes by the Cleveland Police Officers and the Cuyahoga County prosecutor.

In Turoso, et al. v. Cleveland Municipal Court, et al., 674 F.2d 486 (6th Cir. 1982), the Court of Appeals upheld the Ohio obscenity law and held that the petitioners for writs of habeas

corpus were not entitled to habeas relief and were lawfully convicted. This second opinion in the habeas cases contains the reasoning of the Court of Appeals and analysis of the Ohio statute and its judicial construction by the Ohio Supreme Court.

As pointed out in this Brief in Opposition, this Court's 1977 opinion in Ward v. Illinois, infra, upholding the Illinois obscenity laws as construed by the Illinios Supreme Court, demonstrates that the construction of Ohio's statute by the Ohio courts is also consistent with the Constitution and makes consideration of these statutory questions unnecessary at this time.

REASONS FOR DENYING THE WRIT

The Supreme Court Of Ohio Authoritatively Construed The Ohio Obscenity Statute To Conform With Miller v. California And The Statute Is Therefore Constitutional.

On December 7, 1978, the Supreme Court of Ohio rendered its decision in State of Ohio v. Ronald Burgun, et al., 56 Ohio St.2d 354, 356-61, 384 N.E.2d 255, 258-61. Rehearing was denied by the Ohio Supreme Court on January 17, 1979. (No appeal as of right taken to the United States Supreme Court.) This decision specifically held that the definition of obscenity contained in Ohio Revised Code Section 2907.01(F) is not unconstitutionally vague or overbroad, in light of the First Amendment, when read in pari material with, and as construed to include, the guidelines of Miller v. California, 413 U.S. 15, at 24-25 (1973).

This important holding of Ohio's highest court is summarized in 56 Ohio St.2d, at 361, 384 N.E.2d, at 261:

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari material with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

This statement of the Ohio Supreme Court goes to the heart of this federal controversy. This is the case which was referred to as "Burgun II" by the District Court, in finding that the statute "had not been interpreted to

contain the Miller test". Sovereign News Co. v. Falke, 448 F.Supp. 306, at 401 (N.D. Ohio E.D., October 31, 1977). The Cleveland Police Officers submit that the Burgun decision is determinative of the issue of the obscenity statute's validity and mandates that the Court of Appeals decision upholding the statute be affirmed.

It is a fundamental principle in federal actions which seek to test the constitutionality of state statutes or ordinances that if the court of last resort of the state has decided that the statute or ordinance is valid, the federal court is bound by the decision and must yield to the decision of the state court, unless it appears that the law, as construed, contravenes some provisions of the Federal Constitution. As stated in Crowley v. Christensen, 137

U.S. 86, at 92, 34 L.Ed. 620, at 624 (1890):

> The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested, and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it.

Once a state supreme court places a judicial construction upon a statute, all courts must thereafter consider the statute as if it had been originally passed in the words adopted by the limiting court. The federal courts, including the United States Supreme Court, must accept the state court's construction and proceed to test its validity only on that basis, under the traditional standard of "reasonableness". In Guaranty Trust Co. V. Blodgett, 287 U.S. 509, at 513, 77 L.Ed. 463, at 465 (1933), this Court reviewed a statute

which had been construed by the Superior Court of Connecticut, and proceeded to review it on that basis:

> [W]e are bound the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words.

This principle has been consistently followed and applied by this Court, and this language often repeated. See: Albertson v. Millard, 345 U.S. 242, at 244-45, 97 L.Ed. 983, at 985 (1953); United States v. Burnison, 339 U.S. 87, at 89, 94 L.Ed. 675, at 680 (1950); Aero Mayflower Transit Co. v. Board of R. Comrs., 332 U.S. 495 at 499-500, 92 L.Ed. 99, at 104-05 (1947).

This principle has been applied in particular to cases dealing with the construction of obscenity statutes. This Court in Kingsley Pictures Corp. v. Regents, 360 U.S. 684, at 688, 3 L.Ed.2d

1512, at 1516 (1959), noted that the New York Court of Appeals had construed its statute in relation to the film "Lady Chatterly's Lover", and stated:

> We accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . . (Emphasis added.)

In Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, at 60-62, and 63 (1966), this Court again followed and approved an interpretation of New York statutes by New York appellate courts.

The same issue presented here was disposed of when this Court upheld the Illinois pre-Miller statute based upon the limitations and constructions placed on the statute by the Illinois Supreme Court. The Court in Ward v. Illinois, 431 U.S. 767, 52 L.Ed.2d 738 (1977), noted that in 1965 the Illinois Supreme

Court detailed what kind of sexual conduct was cognizable by the Illinois statute.

> The construction of the statute in Sekara gives detailed meaning to the Illinois law, is binding on us, and makes plain that Section 11-20 reaches the kind of sexual materials which we now have before us. If Ward cannot be convicted for selling these materials, it is for other reasons and not because the Illinois statute is vague and gave him no notice that the statute purports to ban the kind of materials he sold. The statute is not vague as applied to Ward's conduct. Id., 431 U.S., at 772-73, 52 L.Ed.2d, at 745. (Emphasis added.)

Ward also noted that in 1974, the Illinois Supreme Court "proceeded to 'construe section 11-20 . . . to incorporate parts (a) and (b) of the Miller standards' . . . but to retain the 'utterly without redeeming social value' standard of Memoirs in preference to the more relaxed criterion contained in part (c) of the Miller guidelines". Ward,

supra, 431 U.S. at 744, 52 L.Ed. 2d, at 746. In 1975 the Illinois Supreme Court again noted that it had incorporated parts (a) and (b) of Miller and the "explanatory examples" found in Miller at 413 U.S., at 25. This Court affirmed Ward's convictions, stating:

> Given that Illinois has adopted Miller's explanatory examples, what the State has done in attempting to bring its statute in conformity with Miller is surely as much as this Court did in its post-Miller construction of federal obscenity statutes. Ward, 431 U.S., at 776, 52 L.Ed.2d, at 747-48.

This effort by the Illinois Supreme Court to conform with Miller was duplicated by the Ohio Supreme Court on remand from Miller, in State, ex rel. Keating v. Film Entitled "Vixen", 35 Ohio St.2d 215, at 218-19 (Sept. 26, 1973), and State, ex rel. Sensenbrenner v. Adult Book Store, 35 Ohio St.2d 220, at 221 (Sept. 26, 1973), cert. denied, 421 U.S.

934 (1975). This pattern continued in the Ohio courts with Hollington v. Ricco, 40 Ohio App.2d 57, at 60, 65-66, 318 N.E. 2d 442 (Cuyahoga County, Dec. 14, 1973), and State, ex rel. Ewing v. Film Entitled "Without a Stitch", 37 Ohio St.2d 92, at 98-101, 307 N.E.2d 911 (Feb, 27, 1974), appeal "dismissed for want of a substantial federal question", 421 U.S. 923 (April 21, 1975). Subsequently, both the Court of Appeals for Cuyahoga County and for Montgomery County, Ohio, approved an interpretation of the Ohio statute to include the "Miller Test". State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (Cuyahoga County, 1976); State of Ohio v. Today's Bookstores, Inc., No. 5248 (Montgomery County Appeal, 1977). This policy of Ohio Courts, and particularly the Ohio Supreme Court, culminated clearly and decisively in State v. Ronald Burgun, 56 Ohio St.2d

354, 356-61, 384 N.E.2d 255, 258-61 (Dec. 7, 1978), rehearing denied January 17, 1979, and State v. Thomas, 57 Ohio St.2d 71, 72 (March 21, 1979) (Per Curiam), where the entire "Miller Test" was specifically adopted into Ohio law and mandated as part of every jury instruction under the definition of obscenity. No appeal was taken by any of the three persons whose convictions were affirmed, Frank Turoso, William Krute, or Thomas Bayless, or by Ronald Burgun, whose case was remanded for trial, even though there was a right of direct appeal to the U.S. Supreme Court. The opinion in that case is, therefore, a final and binding mandate for Ohio.

Several convicted pornographers, including the Sovereign News Company, Petitioner in No. 81-2326, and the habeas petitioners in No. 81-2266, raised arguments in the Cleveland Municipal

Court, the Cuyahoga County Court of Appeals, the District Court, and the U.S. Court of Appeals, that the Ohio statute is invalid because it fails to specifically define sexual conduct in accordance with the examples given in Miller, supra at 25. The District Court in "Sovereign I" accepted these arguments in striking down Section 2907.01(F) of the Ohio Revised Code in Sovereign News Co. v. Falke, 448 F.Supp., at 400, where Judge Manos found that Ohio law permitted material to be found obscene if it contained "simple nudity" or any "display or depiction of extreme or bizarre violence, cruelty or brutality". These arguments were disposed of by the Ohio Supreme Court in Ronald Burgun, supra, 56 Ohio St.2d, at 357-58, 384 N.E.2d, at 258-59:

> The essence of the appellants' criticism is that the definition in R.C. 2907.01

(F) is overbroad "on its face" because an item can be considered "obscene" if any of the characteristics outlined in subsections (1) through (5) are present. Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the tripartite test in Miller v. California (1973), 413 U.S. 15 has been satisfied.

In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part Miller test, the appellants have asserted other instances where the statute conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3) and (5) are facially overbroad because acts of "'simple nudity'" as opposed to hard core pornography can also be considered to be "'obscene.'" Likewise, what is meant by material whose "'dominant appeal is to prurient interest'" is cited as a further example of unconstitutional overbreadth.

> Finally, it is argued that the general lack of specificity found in R.C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.
>
> In summary, appellants allege in effect that the statute not only has not been "limited, as written," in light of the Miller guidelines but also is incapable of a "narrowing construction" in conformity with that decision. We disagree.
>
> The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the Miller decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient. (Emphasis the Court's.)

This first Sovereign News opinion relied upon the lower Court of Appeals decision in State v. Ronald Burgun which was reversed and remanded by the Ohio Supreme Court. The Sovereign News

decision pointed to the Ohio Court of Appeals decision as evidence that the statutory definition had not been construed by the Ohio courts to include the "Miller Test", 448 F.Supp., at 403:

> Because this court has found Section 2907.01 to be overbroad on its face, and that it has not been narrowed to constitutionally permitted parameters by an authoritative state court interpretation, the court finds Ohio Revised Code Sections 2907.01 and 2907.32 to be overbroad. (Emphasis added.)

The "Sovereign I" opinion, supra at 405, also expressed the opinion that Ohio's statute was incapable of a constructive narrowing and stated that "the court never-the-less would find the statute unconstitutionally overbroad":

> Section 2907.01 does not lend itself to a narrowing construction. The statute is so substantially overbroad that only radical surgery could save it.

The Burgun decision is fair warning to all that only those types of sexual exhibitions and conduct which could be sanctioned by Miller may be illegal in Ohio. Furthermore, the Sovereign News Company was on notice by the decision of the Cuyahoga County Court of Appeals in State v. Dalene Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (1976), and State v. Today's Bookstore, Inc., supra (Montgomery County Court of Appeals, 1977), that its pornography would be judged according to the guidelines of Miller.

The Miller decision itself, and the Ohio statute as well, both limited obscenity to avoid the problems found in Sovereign News as to "simple nudity" and violence. As to nudity, it was held in Miller, supra at 25, that "lewd exhibitions of the genitals", without further sexual conduct, could form the

basis for obscenity as long as it would be presented in a prurient and patently offensive manner and lacked serious value. Furthermore, it was held in Ohio in 1948 that simple nudity cannot be considered obscene under Ohio law. State of Ohio v. Lerner, 51 Ohio Law Abs. 321, 81 N.E.2d 282, at 286, 292 (Hamilton County, C.P., 1948).

As to violence, Section 2907.01(F)(3), by its express wording, limits "extreme or bizarre violence, cruelty, or brutality" to a sexual type which must have a "dominant tendency to arouse lust". It is clear that not simple nudity but only lewd-genital nudity can be found obscene under Ohio law and the three-part "Miller Test" and only sadomasochistically sexual violence can form the basis of obscenity under Ohio law. Therefore, pure assult-type violence and "horror movie" type cruelty

would be specifically excluded from Ohio law by the wording of the statute itself.

The Ohio Supreme Court, in Burgun, supra, 56 Ohio St.2d, at 357, 360-61, 384 N.E.2d, at 259, 260, first recognized that the Miller case controls the scope of sexual conduct which can be regulated as well as the test or inquiry to be applied thereto, and then noted that its past decisions had adopted the "Miller Test" under the former similar statute, and that this adoption had been upheld by the dismissal for "want of a substantial federal question" in Art theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975):

> In the case [Miller] the United States Supreme Court, at pages 24-25, described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact. . . . (Emphasis added.)
>
> The essence of these three Ohio decisions [including Ewing] was not that the wording of R.C. 2905.34 (A) (1) through

> (4) [the former similar statute] visibly, literally, or facially incorporated the tripartite Miller test in each of those subsections. What this court attempted to spell out was that the wording of the entire statute, when construed in pari materia with the Miller decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R.C. 2905.34 contained the same disjunctive language currently under attack as well as being more general in its terms and definitions than is successor, R.C. 2907.01(F).

The Ohio Supreme Court used the terms "construed . . . with the Miller decision" because it was obvious that the entire decision was meant to be complied with and adopted into Ohio law, including the limitations on "sexual conduct" and "lewd exhibition of the genitals" of Miller at 25. The reasoning against a reading of Burgun in any other fashion was underscored by the Court in Ward v. Illinois, 431 U.S. 767, at 775 (1977),

where the Court rejected the argument that the Illinois Supreme Court had adopted the first two prongs of the "Miller Test" and did not also, by implication or otherwise, adopt the limitations of the examples of sexual conduct and lewd exhibitions given in Miller at 25:

> The Illinois court thus must have been aware of the need for specificity and of the Miller Court's examples. . . . The alternate reading of the decision would lead us to the untenable conclusion that the Illinois Supreme Court chose to create a fatal flaw in its statute by refusing to take cognizance of the specificity requirement set down in Miller.

The District Court discussed the Ward decision but found it inapplicable to the power of the Ohio courts to similarly construe our statute. Sovereign News, supra, 448 F. Supp., at 400, n.346. In Sovereign News, supra, 448 F.Supp., at 406, n.361, the District

Court said that it was not the case as to Sovereign News Company that it could take notice from prior Ohio convictions. However, there were hundreds of convictions for obscenity in Cleveland from 1973-77 which gave notice to Sovereign as well as numerous past decisions in Ohio. See for example: Cincinnati v. Walton, 76 Ohio Law Abs. 612, 3 Ohio Ops.2d 252, 145 N.E.2d 407, 412 (Cincinnati Muni. Ct. 1957); State v. Lerner, supra (Hamilton County Appeal, 1948); Jacobellis v. Ohio, 378 U.S. 183 (1964); Youngstown v. DeLoreto, 19 Ohio App.2d 267, 48 Ohio Ops.2d 393, 251 N.E.2d 491 (Mahoning County, 1969); Moody v. Thrust Corp., 35 Ohio Misc. 84, 93, 62 Ohio Ops.2d 115, 291 N.E.2d 922 (Franklin County Common Pleas, 1972); State v. Valchar, 34 Ohio App.2d 21, 63 Ohio Ops.2d 52, 295 N.E.2d 137, Syllabus Two (Cuyahoga County, 1973); State, ex rel.

Keating v. Film Entitled "Vixen", supra; State, ex rel. Sensenbrenner v. Adult Books Store, supra; Hollington v. Ricco, supra; State, v. ex rel. Ewing v. "Without a Stitch", supra; State v. Dalene Burgun, supra.

The Ohio Supreme Court did recognize the Ward decision and proceeded to similarly construe R.C. 2907.01(F) to comply with Miller, in Ronald Burgun, supra, 56 Ohio St.2d, at 361, 384 N.E.2d, at 260-61:

> The United States Supreme Court pointed out that subsequent to the Miller decision, the Illinois Supreme Court decisions had proceeded to "construe" Section 11-20 of their Criminal Code to incorporate the guidelines in that decision. Id., at page 774-775. As a result of that state Supreme Court's "response to Miller," the Court indicated, at page 776, that it would not hold the Illinois statute to be "unconstitutionally overbroad."
>
> This court, as previously noted in Vixen and

Sensenbrenner, supra, [35 Ohio St.2d 215 (1973) and 35 Ohio St.2d 220 (1973)] has followed a somewhat similar "response to Miller" in its construction of R.C. 29075.34. Today, that "response" continues with a further clarification by the interpretation and application of its successor, R.C. 2907.01(F).

We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read in pari material with the Miller decision. The Miller test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by Miller. . . .

It must also be remembered that this Court's examples, given at page 25 of Miller, were not stated to be the limit of state regulation of conduct which can form the basis for obscenity under the three-part "test". The Miller decision stated, in this regard, at page 25:

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their

> concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra: [Emphasis added.]
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

It is clear that the Ohio Supreme Court meant to and did construe R.C. 2907.01(F) in such a manner to incorporate the three-part "Miller Test" as well as the general scope of the examples of sexual conduct, as had Illinois, in order to comply with Miller v. California, and also Ward v. Illinois, supra. The Ohio Court's action on these issues conclusively shows that the law has been accorded that which Sovereign

News sought from the federal courts, namely, a constitutional standard for judging obscenity in Ohio.

This effort of the Ohio Supreme Court was recognized by the court of Appeals below in upholding the statute as construed and as intended and a constitutional test for obscenity has been used in this manner since 1973, even before the Ohio Supreme Court ruled.

The Ohio definition of R.C. 2907.01(F) must be tested by the federal courts as if it had been originally drafted in the words of the Miller decision, as the Ohio Supreme Court so held. See also: P.A.B., Inc. v. Stack, 440 F.Supp. 937, at 943 (S.D. Fla. 1977).

It is no answer that the Ohio Supreme Court did not adopt the examples of Miller, supra at 25, since those examples are not the limit of conduct subject to obscenity and the Ohio

decisions have long confined the reach of prosecution to sexual conduct, not mere nudity and not pure violence, and no conflict with the First Amendment will ever be approved by the Ohio Supreme Court. If anything, the Ohio statute is more precise than the "examples" given in Miller, supra at 25. The scope of the examples were clearly adopted by the Ohio Supreme Court and no defect exists for this reason in the present Ohio law.

Finally, it cannot be fairly said that the District Court and Court of Appeals judges were sharply divided with respect to the validity of the Ohio statute. In the Court of Appeals, the Sovereign News opinion on February 4, 1982, was unanimous by the three judges. In the habeas case, Turoso, et al., there was one dissenting judge. Only one judge was common to both panels, so there were four judges upholding the statute with

one judge disagreeing. In the District Court, there were two judges, Judge Manos and Judge Aldrich who ruled the statute invalid and granted habeas relief and two judges who upheld the statute and denied relief, Chief Judge Battisti and Senior Judge Thomas. The prior decisions of federal courts have also ruled in favor of the Ohio statute. See: Grove Press v. Flask, 326 F.Supp. 574, 578-80 (N.D. Ohio E.D. 1970), and New American Library v. Allen, 114 F.Supp. 823, 830-31 (N.D. Ohio E.D. 1953). See also: Huffman v. Pursue, Ltd., 420 U.S. 592, 596 n.4 (1975), and Art Theatre Guild v. Ewing, 421 U.S. 923 (1975) (affirming State, ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 92 (1974).

The Miller standards were the law in Ohio at the time the District Court held the hearing on the preliminary injunction and declaratory judgment and were the law

at the time the District Court announced its decision seven months later. This remains the law today in Ohio and this Court should approve of and affirm the decisions of the Court of Appeals and the Ohio Supreme Court on these statutory construction issues.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that substantial justice was accorded on these statutory issues as to all constitutional claims and the writ of certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari were properly mailed to each of the following counsel on July 24, 1982.

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